

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
SHATSKY, et al., : Docket #1:18-cv-12355
Plaintiffs, : : MKV
- against - :
THE PALESTINE LIBERATION : New York, New York
ORGANIZATION, et al., : July 6, 2021
Defendants. : : TELEPHONE CONFERENCE
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PROCEEDINGS BEFORE
THE HONORABLE JUDGE MARY KAY VYSKOCIL,
UNITED STATES DISTRICT JUDGE

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E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

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THE COURT: This is Judge Freeman. This should be
3 Shatsky v. The Palestine Liberation Organization, et al.,
4 18cv12355. Let me have your appearances for the record
5 starting on plaintiffs' side.

6

MR. STEPHEN SINAIKO: Good morning, Your Honor, my
7 name is Steve Sinaiko, I'm with Cohen & Gresser here in New
8 York City, and I am here this morning on behalf of the
9 plaintiffs with at least one of my colleagues.

10

MR. RONALD WICK: Good morning, Your Honor, this
11 is Ron Wick, also with Cohen & Gresser. I'm in Washington,
12 D.C., also for the plaintiffs.

13

THE COURT: Anyone else for the plaintiffs?
14 Okay, how about on defendants' side?

15

MR. MITCHELL BERGER: Good morning, Your Honor, is
16 Mitchell Berger from Squire Patton Boggs for the
17 defendants.

18

THE COURT: Anyone else on defendants' side?

19

MR. JOSEPH ALONZO: Good morning, Your Honor, also
20 Joseph Alonzo from Squire Patton Boggs for the defendants.

21

THE COURT: All right, and is there anyone else
22 who's not introduced him or herself yet? No? I have my law
23 clerk on?

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THE CLERK: Hi, Judge, I'm on.

25

THE COURT: Okay. Is that everybody?

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MR. BERGER: I was expecting my colleague Gassan
Baloul to join, but there's no reason to delay getting
started if he hasn't.

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THE COURT: So I've been looking at the docket on
this case and trying to figure out what it is you might
need me to do. The reference at the parties' request was
quite narrow. It was just to assist in resolving disputes
that may come up at depositions with respect to scope of
discovery. Who just joined please? This is Judge Freeman.

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MR. GASSAN BALOUL: This is Gassan Baloul from
Squire Patton Boggs.

THE COURT: I'm sorry?

MR. BALOUL: This is Gassan Baloul from Squire
Patton Boggs.

THE COURT: I'm having trouble hearing. Is
someone else able to --

MR. BERGER: That's my colleague Gassan Baloul
from Squire Patton Boggs for the defendants.

THE COURT: Okay, your connection is not great.
All right, so as I was saying, it looks like you were
looking for and were granted the services of a magistrate
judge, that would be me, to assist in resolving disputes
about questions that may be asked at depositions which I
gather you have a limited time now to conduct. Maybe some

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2 have already been conducted, I hope that's the case with
3 time running. But I'm not sure what help you think you're
4 going to need given that you had a fairly lengthy
5 conference with Judge Vyskocil and she gave you guidance
6 with respect to the proper scope of this jurisdictional
7 discovery. So can I hear from counsel as to what you're
8 envisioning my role would be and why you think you need me
9 and when you think you need me, if, in fact, you need Just
10 identify yourself before you speak each time.

11 MR. SINAIKO: Certainly, you know, it's Steve
12 Sinaiko for the plaintiffs. I think the reason that we
13 asked for a magistrate judge to be assigned to assist with
14 depositions is because the case actually presents some
15 unusual issues of personal jurisdiction under the Promoting
16 Security and Justice for Victims of Terrorism Act, and we
17 also are expecting that the defendants are going to use,
18 are going to assert functional immunity as a grounds, you
19 know, functional diplomatic immunity based on their
20 participation as permanent observers at the United Nations
21 as a reason why some of the witnesses in the case don't
22 need to answer questions that we may pose to them at their
23 depositions concerning activities of the defendants in the
24 United States which are an express element of personal
25 jurisdiction under the statute I mentioned a moment ago.

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2 So I think the idea was that we wanted to have a
3 magistrate judge who would be able to help us sort out
4 these issues if they come up, you know, as promptly as
5 possible so that the depositions can be completed in
6 advance of the discovery cutoff that Judge Vyskocil had set
7 for us. The depositions, the first of the depositions is
8 set to happen this coming Thursday, that's I think the 8th
9 of July, and then the deposition schedule, just a bunch of
10 issues. The deposition schedule resumes on the 22nd and 23rd
11 of July, and then there are depositions I believe Tuesday
12 through Friday of the following week as well.

13 So that's the schedule and that's in a high level
14 way the, you know, the nature of the assistance that we
15 anticipate needing, and then I think, you know, the other
16 reason to have a conference call, apart from letting Your
17 Honor know what the schedule was, was to find out how Your
18 Honor would like to address these issues if and when they
19 come up.

20 THE COURT: Well, first of all, why do you
21 anticipate that you will have problems? And if you think
22 you're going to have problems on certain topics, can you
23 talk about your concerns ahead of time and try to reach
24 agreement on certain key points so that you don't have to
25 be reacting in the middle of a deposition and trying to

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2 find a judge who may or may not be tied up? Because I have
3 a fairly busy schedule, I have things on my calendar, and I
4 do take calls from depositions when I can. When I can't, I
5 generally tell people, you know, make a record, keep going
6 and reserve it and come back to me as soon as you're able
7 or as soon as I'm able to hear you which might be later in
8 the day, might be at a lunch break, might be, you know, on
9 a written record.

10

But why do you think you're going to have
problems, and if you can anticipate what those problems are
going to be, why can't we talk about them or you talk about
them with each other ahead of time and see if you can head
off the problems?

15

MR. SINAIKO: Your Honor, Steve Sinaiko again.
And I appreciate that. I think one of the principal issues
is that the plaintiffs in the case don't actually concede
that there is such a thing as functional immunity here, and
even if there were such a thing, we don't concede that it
applies to these defendants. So in our view this
functional immunity argument wouldn't be a basis for the
defendants to direct their witnesses to refuse to answer
any questions. But obviously the defendants take a
different view, and I'm not sure that that's an issue that
we're going to be able to resolve in advance of the

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2 depositions.

3 Now that said, I mean even with the issue
4 unresolved, to the extent there are --5 THE COURT: Well, Judge Vyskocil already ruled
6 that defendants can make objections based on functional
7 immunity if they believe that they have a legitimate
8 objection on that ground. She didn't say, she didn't rule
9 there was no such thing and that such objection would be
10 improper. She said the defendants have what they believe
11 to be a legitimate objection under the U.N. whatever it is,
12 headquarters charter, that they can assert those
13 objections. So are you going to be looking to me to make a
14 ruling that there is no such thing and questions have to be
15 answered?16 MR. SINAJKO: Well, certainly, I mean, you know,
17 obviously we were, you know, we've seen Judge Vyskocil's
18 rulings as well, and while she said that the defendants are
19 free to make objections based on privilege if they think
20 that they have such objections, I don't think that she made
21 a ruling that they are entitled to assert this purported
22 privilege. On the other hand, like I said, I don't think
23 that the issue necessarily will need to be resolved in that
24 direct a way depending on how the questioning unfolds at
25 the deposition. But I mean I think our first position --

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2 THE COURT: Well, hold on a second, if you are
3 looking for a ruling as to whether a privilege or immunity
4 is being properly asserted, I'm going to have to have a lot
5 more to go on than seat of the pants, someone calling me in
6 the middle of a deposition and saying this question is
7 improper because or this question is proper because or
8 should be answered or should not be answered. I'm going to
9 have to understand what this immunity is, I'm going to have
10 to understand what the argument is as to why it does or
11 does not apply, I'm going to have to understand what you
12 believe the scope of it is. This is not like attorney-
13 client privilege or delivery of process privilege or
14 something we see frequently. This is something that I
15 don't have day to day in my cases.

16

So do not expect me to make rulings in the middle
of a deposition as to whether a privilege is being properly
asserted. You're going to have to give me briefing on that
if you want, and I don't know that Judge Vyskocil
anticipated referring it to me to make that decision.

21

MR. SINAIKO: I totally appreciate that, Your
Honor. It's Steve Sinaiko again. And that was actually
the reason that we felt like it would be appropriate to
have a conference call with Your Honor in advance of the
depositions so that we could discuss a process for getting

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2 Your Honor whatever briefing she might need so that rulings
3 on these issues can be made in a reasoned way.

4 THE COURT: Well, did you have the understanding
5 from Judge Vyskocil that she was looking to me to define
6 and rule on the scope of this immunity and its
7 applicability in this case generally? Because, you know,
8 I'm not sure that she had that in mind when you wrote the
9 letter and said, you know, make some rulings during the
10 deposition. You know, if she envisioned your briefing me
11 fully on an issue and my opining on it in an advisory way
12 or otherwise. I mean I realize that cases can be referred
13 to magistrate judges for all discovery matters and to make
14 rulings with respect to all discovery matters, but, again,
15 what you asked for was fairly limited, and I think what the
16 letter sounded like and what she probably envisioned was
17 you have a quick dispute at a deposition, you call up, you
18 each make your pitch, and I try to resolve it and keep you
19 moving along, not that I'd make a ruling that could
20 substantially impact the case in some manner.

21

21 MR. SINAJKO: Well, Your Honor, I think it was
22 reasonably clear from the conference with the judge that,
23 you know, with Judge Vyskocil that is, that issues are
24 likely to come up at the deposition will turn on, most of
25 the depositions, will turn on questions of this functional

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2 immunity. I mean I guess --

3 THE COURT: She already said that the objections
4 can be made. If defendants believe they have this
5 legitimate objection, they can make those objections to the
6 questions. So if you're asking me to rule or anticipating
7 that there's going to be such an objection made and asking
8 me to rule that it's an improper objection and that the
9 question should be answered, she's already ruled that the
10 objection can be made. Hold on one sec here. Let me get
11 the transcript here. Hang on a second.

12

(pause in proceeding)

13

14 THE COURT: She said, To the extent the defendant
15 has legitimate objection, for example, there's an argument
16 that will be asked, I guess the question will be asked will
17 invade functional immunity under the United Nations
18 Headquarters Charter, if questions get asked that invade
19 privileged areas, object on the record at the deposition.
20 She's already said if, I mean maybe what you're focusing on
21 is it a legitimate objection and you want me to rule
22 whether it's a legitimate objection or not, but that's
23 going, you know, that's - I interpret that - I interpret
24 her comments to mean that if defendants' counsel acting in
25 good faith with their obligation to assert a position
that's well founded by law or in their view legitimately

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2 appropriate as an extension of existing law, if they in
3 good faith believe that they have a basis for objection,
4 it's not going to be sanctionable, it's not going to be
5 frivolous, they have a good faith basis for that objection,
6 they can make that objection on the record at the
7 deposition. I don't think what she was saying was the
8 nuances will be determined by Judge Freeman who will
9 determine the scope of privilege and decide whether each
10 and every objection is a legitimate one or not.

11 And to the extent you have an argument that no
12 such objections are permissible, no such objections would
13 be legitimate, that's - and so any objection that's made on
14 that ground is going to be an objectionable objection.
15 That's asking a big fundamental question that I'm not sure
16 she envisioned that I would decide. If what you're asking
17 is, look, we think that, to the extent objections are made,
18 they could only even potentially be legitimate if they are
19 XYZ but not if they're, you know, ABC, then you should be
20 discussing that ahead of time. And if there's something
21 narrow that you can put in front of me for guidance and
22 that you can provide me some letters on and some case law
23 support for, I can take a look at it. But if your
24 depositions are starting up real fast, that's got to be put
25 in front of me real fast, and I've got to have a chance to

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2 look at it real fast.

3 MR. BERGER: Your Honor, this is Mitchell --

4 THE COURT: But I'm not going to be making some
5 wholesale ruling, I don't think, that this sort of immunity
6 simply doesn't apply in this case and it's wholly improper.

7 MR. BERGER: Your Honor, Mitchell Berger for the
8 defendants. If the Court would just give me a few minutes
9 to give you our perspective on this. We come out I think
10 where Your Honor has indicated which is we did brief this
11 in front of Judge Vyskocil. If you look at docket number
12 66, page 4 where we lay out the authorities on functional
13 immunity in docket number 65 at page 4. So Judge Vyskocil
14 did not address this in a vacuum.

15 But as importantly what we certainly understood
16 her to say is not only may we make objections, but we may
17 instruct the witness not to answer because otherwise we
18 loose the benefit of the functional immunity. We have some
19 pretty good sense of where the lines are drawn for
20 functional immunity because we have produced calendars from
21 the U.N. Mission. So in terms of when the ambassador - for
22 example, Thursday's the deposition of the Palestinian
23 ambassador to the UN. When he had a meeting, where he had
24 a meeting, how he had a meeting, like whether it was
25 virtual or whether it was in person, those are fair game.

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2 What was discussed at a meeting, why the meeting took
3 place, that's not fair game under functional immunity. And
4 who the ambassador met with may depend on the circumstances
5 be subject to immunity because who may reveal the what and
6 the why that is protected by functional immunity.

7 There's very little doubt that functional immunity
8 extends to the Palestinian embassy, the mission to the
9 United Nations. That's in the authorities that I mentioned
10 at docket 65 and 66, and we believe Judge Vyskocil said,
11 fine, make your objections, issue your instructions. If it
12 requires resolution by the court, then, of course, you'll
13 all come back.

14 So from our perspective this call is helpful to
15 determine how best either Your Honor wants to approach
16 those questions of resolving instructions or if Your Honor
17 thinks that the kinds of issues I've just laid out are
18 better before Judge Vyskocil, then that's helpful as well.

19 THE COURT: Well, who was it who asked for a
20 magistrate judge to be available, was it plaintiff?

21 MR. SINAIKO: The parties jointly requested that
22 actually, Your Honor, because they think the parties, based
23 on our own interactions in advance of these depositions,
24 anticipate that there will be disputes as between us
25 regarding the appropriate scope of instructions, you know,

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2 appropriate scope of instructions not to answer. And as I
3 said a moment ago, we have our --

4 THE COURT: Do you anticipate that any and all
5 problems that may arise relate to functional immunity as
6 opposed to anything else like whether the questioning is
7 broader than the relevant prongs of the statute or anything
8 like that? Because I know there were other issues that
9 Judge Vyskocil addressed. Do you think the main or even
10 the only issue where you're going to likely look for
11 guidance is on the scope of this immunity?

12 MR. SINAJKO: My sense, Your Honor, is that the
13 scope of - and this is Steve Sinaiko again for the
14 plaintiffs. My sense is that the scope of this supposed
15 immunity may not be the only issue, but it is likely to be
16 the principal issue, and actually given that privilege logs
17 that have been served on us already, we think that it's
18 going to be a substantial issue because --

19 THE COURT: Well, I'm likely to rule that
20 defendants should think twice and three times about making
21 the objection and instructing a witness before doing so to
22 make sure you are confident that you believe you're on
23 solid ground and can support that objection and with good
24 case authority if called upon to do so afterwards. And if
25 you believe that you can and you believe you're on solid

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2 ground, make your objection, make your instruction. It'll
3 be on the record and continue on with the deposition. It
4 seems to me that that's what Judge Vyskocil envisioned and
5 that's what I would be inclined to enforce.

6 If there's something that really looks like it's a
7 frivolous objection, that there really is no basis for it
8 in the case law, defendants are cautioned that you may have
9 to be bringing back a witness again. You may be sanctioned
10 for making frivolous objections. You know, you need to
11 really think it through. But if you think the parameters
12 are fairly clear, you think you've got a good faith basis
13 for asserting it, assert it, put it on the record. And if
14 the objection, if with the objection you believe the case
15 law would support your instructing the witness not to
16 answer, then make the instruction, put it on the record,
17 but be prepared to support your actions down the road if
18 called upon to do so because invariably, it sounds like,
19 you're going to be called upon to do so.

20 MR. BERGER: Your Honor, Mitchell Berger for the
21 defendants. We hear that, and part of the reason why I'm
22 trying to be transparent about both what we've said before
23 about functional immunity and how we intend to apply it is
24 because we do believe it's on solid ground. But Your Honor
25 can appreciate any privilege or immunity that if we don't

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2 protect the what did you discuss and why did you discuss
3 it, then the privilege is lost. So we feel very strongly
4 we have a good faith basis. We think the law supports us.
5 We are trying to draw --

6 THE COURT: By the way, is it an absolute or is
7 it a qualified immunity?

8 MR. BERGER: Well, functional immunity is by its
9 nature qualified in this sense that the language coming out
10 of the UN's legal secretariat is that the scope of immunity
11 relates to words spoken and deeds done, and I'm quoting
12 here from material we have put before Judge Vyskocil,
13 quote, "In the exercise of the observer function," so the
14 Palestinian Mission to the United Nations is an observer
15 mission. So, so long as the conversations were held in the
16 exercise of the observer function, then we're quite
17 confident that functional immunity applies. We are not
18 asserting, to be clear, diplomatic immunity which would be
19 absolute under the Vienna Convention, and so this is a
20 question by question, answer by answer assertion of
21 functional immunity.

22 But if I could return to Your Honor's question, I
23 do think there's a potential for other objections in terms
24 of scope because, as Your Honor knows, Judge Vyskocil said
25 in her order of April 29, docket number 80, that not only

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2 is discovery limited to the jurisdictional bases, but she
3 said expressly in the April 29 transcript at page 23,
4 everything else is off limits. So until we hear their
5 questions, we don't know whether there will be other scope
6 objections. And there are other depositions coming up
7 later where there may be scope objections.

8

Perhaps, Your Honor, I could make a suggestion to
9 the Court which is we're trying to be transparent, here's
10 where we're going to make our objections, here's where
11 we'll issue our instructions. We'll get through the
12 morning session on the 8th with the U.N. ambassador. If the
13 parties think it would be beneficial to speak with Your
14 Honor, perhaps during the lunch break at that deposition
15 and Your Honor has time to hear us on the 8th somewhere
16 around the lunch time, perhaps we can call and get some
17 additional guidance. If not, we'll have to deal with it
18 some other way.

19

THE COURT: All right, my schedule on the 8th is
20 as follows: As of now, but that may well change, my
21 morning is fairly clear, and the reason I'm saying it may
22 well change is because I had to move some things off of
23 another morning, and I'm looking for a place to reschedule
24 them and they may end up there. My lunch time is usually,
25 in terms of whether I have conferences scheduled, between -

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2 not necessarily whether I'm eating - between 1 and 2.

3 Usually my scheduling allows for a break between 1 and 2.

4 Certainly on the 8th my guess is 12:30 to 2 is relatively
5 clear. Two o'clock I have a conference that is likely to
6 be lengthy and somewhat intense, and so I will probably not
7 be available from 2 to at least 3 and possibly 4. Okay.

8 So the end of the day on the 8th I could also be
9 available, you know, if you wanted to hold something and
10 give me a call at the end of the day, maybe after 4.

11 That's a little iffy. If you try me and I'm tied up, I'll
12 be tried up.

13 I don't know if I'll be in chambers that day or
14 not. We're also scheduled that day to have a computer
15 upgrade in chambers which means the IT people will be
16 swarming around, taking away our computers and replacing
17 them. And we were - I don't know if that's really going
18 forward on that day. It was - it was scheduled for that
19 day. They might shift it. But anyway, if that happens,
20 not only - I may end up working remotely that day because
21 if I need a computer, I may be better off if I'm actually
22 home than if I'm in chambers. So there's that going on in
23 my chambers on that morning.

24 So if you need something, you can try in the
25 morning. You can certainly try around lunchtime. What you

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2 can do is you can call my chambers, and if no one answers,
3 it's because we've all run away from the IT people to try
4 to find another place to work. You can just leave a
5 voicemail in chambers. A voicemail in chambers will kick
6 to my email, it will pop up, I will get it. Okay? Leave a
7 phone number where you can be called back, and I will get
8 back to you if need be as long as I can. Once we hit 2
9 o'clock on that particular day, I'm going to be underwater
10 for at least a couple of hours. Okay?

11 Picture during this call someone suddenly calls in
12 from a deposition, I say, oh, sorry, I gotta run, and then
13 I'm tied up for however long and leaving you all hanging.
14 If it's something, if I'm in the middle of a settlement
15 conference, if I'm in the middle of - and we just lost
16 somebody. Do we still have plaintiff's counsel?

17 MR. SINAIKO: Steve Sinaiko, I'm still here, Your
18 Honor.

19 THE COURT: You still have someone speaking on
20 defendants' side?

21 MR. BERGER: Yes, Your Honor, Mitchell Berger.

22 THE COURT: Okay, we may have lost one of your
23 colleagues, but hopefully whoever dropped off will call
24 back.

25 Let me look at my calendar for the other days that

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2 you mentioned, and, by the way, with respect to other sorts
3 of scope issues, for example, whether the questions relate
4 to the prongs of statute that are issue here on
5 jurisdiction or relate to other things when Judge Vyskocil
6 had said the depositions are limited to these categories
7 that are in the statute and the bases of the asserted
8 jurisdiction in this case under that statute and that
9 everything else is off limits.

10 I'll flip my warning to plaintiff on this. I've
11 already cautioned defendants that if they're going to
12 object, they better think a few times about it and make
13 sure they're comfortable that they're on solid ground. If
14 you're going to ask a question and defendants said, wait,
15 that's outside the scope of the statute and the prongs of
16 the statute that are at issue here, asserted basis for
17 jurisdiction, and Judge Vyskocil has said something outside
18 the scope of that is off limits, be confident that the
19 question you're asking can be justified as being within
20 that scope directed toward that prong, whichever one it is,
21 of the statute. And if you can't make that argument with a
22 straight face and feel that it's well supported, do not be
23 asking that question. Because, again, she already gave you
24 guidance on that, and I expect you, just like I expect
25 defendants, to adhere to the guidance she gave you. Okay?

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Let me look at my calendar. Tell me again what the second date is for depositions.

4

MR. SINAIKO: So we have the 8th with Mr. Mansour and then on the - he's the Permanent Observer of the Palestine Liberation Organization to the United Nations. On the 22nd and 23rd we have depositions scheduled of two other people who work at Permanent Observer Mission to the United Nations here in New York and then the following week

10--

11

THE COURT: The 22nd and 23rd - I mean the farther out you go, the more room there is in my calendar. As it gets closer to the day, it tends to fill up more. So what I will do is for each of those days, the 22nd, 23rd. I will ask my deputy to carve out from 12 to 2 a space, not to schedule anything at 12, to make sure that I have availability from 12 to 2 on the 22nd, the 23rd, and then the following week which days?

19

MR. SINAIKO: So I believe and Mr. Berger can confirm that we're scheduled to proceed Tuesday through Thursday of the following week. So that would be the 27th to the 30th of July.

23

MR. BERGER: Your Honor, Mitchell Berger. I can confirm that that's going to be easier and those depositions are not going to involve functional immunity

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2 but they will involve scope issues. But because the
3 witnesses will be testifying virtually from the Middle East
4 and each of the two 30(b) (6) designees will be testifying
5 over a two-day period from 7:30 in the morning eastern time
6 till 11:30 in the morning eastern time, there it would be
7 convenient I would think in between day one and day two,
8 given that the entire east coast afternoon is available, to
9 speak to you on perhaps the Tuesday midday and the Thursday
10 midday of that week which I think is the 27th and the 29th of
11 July.

12

THE COURT: All right, the --

13

MR. SINAJKO: That's probably right.

14

THE COURT: So if you're looking for a block of
15 time, on the 27th, again, if it would be helpful, I could
16 block out 12 to 2. On the 29th I already have something
17 scheduled at 12, but I could hear from you probably from 1
18 to 2.

19

MR. SINAJKO: Right, Your Honor, it's Steve
20 Sinaiko. There is - I agree with Mr. Berger that we don't
21 anticipate significant difficulties around the depositions
22 to which he was referring a moment ago, the 30(b) (6)
23 witnesses who are going to testify from the Middle East.
24 And to the extent there are issues with those depositions,
25 the schedule makes it easier for us to address them with

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2 Your Honor. There is the possibility, it's not, you know,
3 it's not set in stone, but there is scheduled currently
4 another deposition on the 30th that might be double-tracked
5 with the second half of one of the 30(b) (6) witnesses, and
6 that is a deposition that, if it proceeds, would involve
7 the same issues as, you know, the immunity that we've been
8 discussing.

9

THE COURT: Right now my most heavily scheduled
10 day is the 29th, and I have a doctor's appointment in the
11 afternoon of the 28th. I don't think you were looking for
12 the afternoon of the 28th. So the afternoon of the 27th as
13 of now it's okay, and like I said, I can carve out 12 to 2
14 for you. The 29th I could carve out 1 to 2, and the 30th I
15 could do 12 to 2 if that's helpful if you have something
16 double-teamed on the 30th.

17

MR. SINAIKO: Your Honor, I think that's perfect
18 from a scheduling perspective.

19

THE COURT: All right, so let's back it up. Let
20 me just jot down all the dates. The 21st was it and the
21 23rd, 22nd and 23rd?

22

MR. BERGER: 22nd and 23rd, Your Honor.

23

THE COURT: 22nd and 23rd I'll try to block out 12
24 to 2. I'll try to block out 12 to 2 every day except the
25 29th where I already have something at 12. Okay? And for

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2 this coming, for this next, for the deposition that's next
3 up is this coming Thursday, the 8th, I'll try to block out
4 again 12 to 2. I'll try to block out 12 to 2 every day
5 except for that one day when I already have something at
6 12. Okay? Which is the 29th. All of the other days I'll
7 try to carve that out for you to call in if you need to.

8 But just temper your expectations about what kind
9 of rulings you'll be able to get from me. I mean I do
10 handle rulings, I do handle disputes from depositions when
11 they occur, and I try to make rulings. Sometimes my
12 rulings are make your record, you know, sometimes that's
13 the way that I resolve it. Sometimes it's that question is
14 confusing, you should reframe it or, you know, stop making
15 speaking objections or, you know, the kinds of things
16 people call me, they say somebody's being harassing or
17 whatever, I lecture people.

18 But be prepared to have the court reporter read
19 back to me a particular question, a particular answer, and
20 just understand that most likely I'm going to look to you
21 to tell me with straight faces that you have a good faith
22 and you believe sound basis for asking a question because
23 you believe it is geared to one of the prongs of the
24 statute at issue. And you have a good basis on the other
25 side for asserting immunity and you have case law to

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2 support it, and the case law would also support the
3 instruction, you know, in which case I'm going to say make
4 it, put it on the record.

5 So there may be issues around the edges where I
6 make specific rulings and say yes or no on a particular
7 question or a particular response, but more likely I'm
8 going to be looking to you to look carefully at what Judge
9 Vyskocil ruled already and adhere to it.

10 And I'll touch base with her and see if we can put
11 our heads together about our expectations are about this
12 immunity. If she says I would actually like it if you
13 would look at the broader question of the immunity and, you
14 know, make broader rulings on it, then I will do so. I
15 just have some doubt that that's what she had in mind. But
16 if she does, then I will get back to you, probably through
17 my clerk who's on this line, and ask you for some briefing.
18 Okay?

19 MR. BERGER: Thank you, Your Honor. This is
20 Mitchell Berger for defendants. Just one other thought in
21 advance of what I'm sure inevitably will be a call to you
22 on Thursday which --

23 THE COURT: By the way, you do not have to call
24 me. If the period from 12 to 2 comes and goes and I don't
25 hear from you, do not feel that you're letting me down or

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2 that you're violating some court order that you must call
3 me. You do not have to call me. I would welcome a lack of
4 calls.

5 MR. BERGER: Well, Your Honor, speaking for the
6 defendants, we would welcome not having a call as well
7 because we've, as I said, tried to be transparent about how
8 we're going to approach this and what instructions we're
9 going to issue. So we're not going to be looking to call.

10 But I just wanted to lay one other thought out for
11 the Court in advance of potentially hearing from us on the
12 8th which does actually affect how what may be a series of
13 questions get asked and whether they raise immunity or even
14 whether they need to be answered, which is the focus of the
15 questioning here is whether the defendants have engaged,
16 according to the language of the statute, in any,
17 quote/unquote, "any activity." So to the extent the same
18 question is asked a hundred times about a hundred different
19 types of activity, regardless of the immunity issue, there
20 comes a point where enough is enough.

21 I don't expect Your Honor to rule on that. I'm
22 just saying that in terms of what happens is Mr. Sinaiko
23 says we've saved up 20 template questions, they all ask the
24 same thing, I don't think we need Your Honor to be
25 resolving the question on all 20. These are, you know,

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2 when Judge Vyskocil said the jurisdictional predicates, one
3 of those jurisdictional predicates is the word any, even so
4 it becomes a question of what becomes cumulative.

5

THE COURT: Look, I'm not sure this is what
6 you're saying, but if there are numerous questions and
7 responses that are all of a piece, that all follow the same
8 kind of pattern, the argument is the same on all of them,
9 you certainly don't need to raise all of them with me, and
10 you should take whatever answer I give you and extrapolate
11 with respect to others that are similar. I'm not sure if
12 you're saying something other than that.

13

MR. BERGER: Your Honor, I think that's obviously
14 very helpful guidance and that is part of what I'm saying.
15 The only other thing that I'm saying is that sometimes if
16 there is a tough nut to crack on immunity but it's cracked
17 in a way that supports the immunity instruction, then I
18 guess what I am saying is what Your Honor is saying, that
19 we'll extrapolate from there. But I hope the plaintiffs --

20

THE COURT: I don't know what that means. I
21 don't understand, without a concrete example I don't know
22 what you're talking about.

23

MR. BERGER: All right, well, let me there to be
24 as concrete as possible. We have produced calendars for
25 the ambassador and the deputy ambassador to the U.N. Each

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2 of them has well over a hundred line items. We've also
3 produced a privilege log for the ambassador and the deputy
4 ambassador concerning meetings, and they probably have well
5 over 200 line items. It seems to me needless to go through
6 every one of the line items in the calendar regardless of
7 the immunity issue if the goal here is to prove that the
8 defendants have engaged in, quote/unquote, "any activity"
9 falling under the statute. We know from the plaintiffs'
10 briefing that they're focused on things that don't raise
11 questions of private conversations. They're focused, for
12 example, on addresses the ambassador made to various
13 universities.

14 And so to consciously try to invade the privilege
15 in private conversations I guess my point is is that is a
16 reason to respect the privilege when they don't need to go
17 there in order to do what Judge Vyskocil told them to do
18 which is focus on the jurisdictional predicates.

19 THE COURT: Well, look, I gather these are all
20 plaintiffs' depositions, plaintiffs are taking these
21 depositions or is it some on each side?

22 MR. BERGER: No, you're correct. Mitchell
23 Berger, Your Honor, that's correct. These are
24 jurisdictional discovery depositions. They're all
25 plaintiffs' --

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2 THE COURT: So plaintiff is taking these
3 depositions. So, plaintiff, you have a certain number of
4 hours for these depositions. You may not get the witnesses
5 back again. If there are objections and they come back to
6 the Court afterwards and you say we need you to rule
7 specifically on these objections and if you overrule them,
8 we need to have the witness back, the Court may say no. So
9 you have to look at the time that you have and use it
10 wisely, and if you spend a large portion of your time going
11 into areas where you're getting objections and you're
12 getting frustrated and whatever, think about is there
13 something else I better be doing with my time as well or
14 instead of this where I'll get testimony, where I'm assured
15 of getting testimony or the testimony may be usable on the
16 issue of jurisdiction. So if there is something that is
17 public on which they would not, certainly not be immunity
18 even if immunity is available and that would be useful
19 territory, maybe make sure you spend some of your time on
20 that because think of every deposition as this may be your
21 one shot at it for the jurisdictional discovery and you may
22 not get, you may but you may not get the witness back
23 again. All right? So --

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MR. SINAJKO: Your Honor, it's Steve - oh, I
apologize.

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THE COURT: No, no, I'm sorry, I'm probably just repeating myself here. Go ahead.

MR. SINAIKO: It's Steve Sinaiko, and we certainly appreciate that guidance. I think our concern around these issues is that we're going to be precluded by instructions from probing the basis for the privilege assertions in a way that would allow us to build a record that the privilege doesn't apply if it exists at all. So -

-

THE COURT: Well, any and all privilege questions, and I think I heard this from defendant, I don't think they would disagree with this, there are going to be certain foundational questions to establish whether or not something is legitimately privileged. Even attorney-client you can ask who the people were who were having the conversation and whether there was anybody else in the room at the time, you know, and general subject matter. Just like on a privilege log, you're supposed to identify general subject matter without revealing the content of the advice requested or advice given.

There are certainly questions that will help establish whether there is or is not a ground for an immunity objection. And I'm assuming defendants recognize that there are such questions and will allow such questions

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2 to be answered.

3 So I mean I don't know exactly what is needed here
4 in order to trigger this privilege. You already know what
5 the person's job was, what the role was, you know, whether
6 something was spoken within that role if that's part of the
7 test. Then you have to answer the questions that would
8 enable the parties and the Court to determine whether it's
9 privileged or enable you to argue that it is, would enable
10 plaintiffs to argue it is not, and to enable the Court to
11 determine who's right.

12 So I don't expect anything and everything
13 surrounding a meeting, for example, to result in an
14 instruction. I only - and I think defense counsel already
15 said this, that they feel that there's a line.

16 MR. BERGER: For defendants, Your Honor, Mitchell
17 Berger again. Yes, we hear that loud and clear and we're
18 trying to not only draw those lines appropriately but to be
19 transparent about where we're drawing those lines.

20 MR. SINAJKO: Your Honor, it's Steve Sinaiko for
21 the plaintiffs. If the depositions unfold as Your Honor is
22 suggesting, that should be fine.

23 THE COURT: All right, look, your goal, I would
24 say your mission but that sounds like it might be a pun,
25 your goal should be to proceed without need for calling me.

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2 That's ideal. What that means is you're working well
3 together and cooperatively together, you're trying to work
4 through issues on your own before you raise them with me
5 and you're successfully making your positions clear and the
6 things that you think are important and building your
7 records.

8

And I'm not sure how well you've been working
9 together in this case. It seemed to me from taking a look
10 at the transcript of the conference before Judge Vyskocil
11 that she may have had the sense that you weren't working
12 all that well together. I think she suggested at one point
13 you put things in writing because you weren't able to talk
14 with each other. Am I remembering that correctly?

15

You need to be able to confer fully in good faith
16 about any and all discovery disputes before raising them
17 with the Court, including an issue that comes up at a
18 deposition, you go off the record, you talk about it, you
19 confer fully, you see if you can resolve it, you see if you
20 can narrow it, you see if you can work around it to some
21 extent. You see if, you know, you say what if I ask a
22 background question on this, would that get us somewhere.
23 You see if you can - do it as much as you can do without
24 running into problems before you reach a point where you
25 are really at impasse on some issue and you need the

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2 Court's intervention. All right, I enforce the good faith
3 conference requirement, and I don't see why a dispute that
4 arises at a deposition should be any different from any
5 other discovery dispute in terms of that good faith
6 conference requirement. All right?

7 MR. BERGER: Your Honor, Mitchell Berger for
8 defendants. We hear you loud and clear. I think things
9 have taken a dramatic shift since the April 29 conference
10 with Judge Vyskocil. I think we've been able to confer in
11 good faith about a number of issues, and I expect we may be
12 able to do so here and toward that end that's why I've
13 tried to be transparent both with the Court now and with
14 plaintiffs as well in advance about where we're going to be
15 drawing the lines. So other than not knowing their
16 questions, we have no secrets about where our objections
17 and instructions are.

18 THE COURT: All right. Go carry on and I expect
19 you'll be able to work together. I see no reason why you
20 cannot. And, you know, you have to have a little trust in
21 the other side too that if they're tell you they have a
22 good faith basis for something and that they believe they
23 can support it, on either side, that, okay, they're
24 counsel, they say they've got a good faith basis for
25 something, they say they believe they can support it if

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2 push comes to shove and there's a later motion made, move
3 on, make the record, move on. And if you're really at
4 that's ridiculous, that's frivolous, how could you do that,
5 that's well outside what Judge Vyskocil said, you know, how
6 can you even say that and you're just going at it like
7 this, that's not good faith conference, that shouldn't be
8 happening. If something really degenerates and you really
9 can't get anywhere and you really think it's critical, then
10 you get in touch with me and I will make myself available
11 and try to help you as best as I can in that moment. All
12 right?

13

14 MR. SINAIKO: Your Honor, it's Steve Sinaiko. We
15 certainly always make every effort to work in good faith
16 with the defendants, and it's certainly not our goal to
17 need to involve you with the depositions, but, you know, to
call you from the depositions --

18

19 THE COURT: There should be very little reason
20 for you to call me given the guidance you've already had
21 both from Judge Vyskocil and from me. There really should
22 be very little reason - most depositions go forward without
23 calling judges. So you should be able to do it. If you
24 really need me, you have times blocked out when you can
contact me. Okay?

25

MR. SINAIKO: Your Honor --

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MR. BERGER: Thank you, Your Honor.

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MR. SINAJKO: -- we appreciate it.

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THE COURT: All right, you're welcome. Take care, everybody.

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MR. SINAJKO: Thank you for your time today.

7

THE COURT: All right, bye bye.

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(Whereupon, the matter is adjourned.)

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C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Shatsky et al v The Palestine Liberation Organization et al, Docket # 18-cv-12355-MJV, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature 

Carole Ludwig

Date: July 12, 2021